

COPY

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

IN THE MATTER OF:)	
THERESA HITCHENS-ABRAMS,)	
Grievant,)	DOCKET NO. 05-06-329
)	
v.)	
)	DECISION ON
DEPARTMENT OF CORRECTIONS,)	MOTION TO DISMISS
Employer.)	
_____)	

BEFORE Brenda C. Phillips, Chairperson, John F. Schmutz, Esquire, and Paul R. Houck, Members, constituting a quorum of the Merit Employee Relations Board ("MERB" or the "Board") pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

For the Appellant: Theresa Hitchens-Abrams, *pro se*
William Wharton, Union Representative, COAD

For the Department: Ilona Kirshon
Deputy Attorney General
Carvel State Building
820 N. French Street
Wilmington, DE 19801

BACKGROUND

This matter is before the MERB on a Motion to Dismiss filed by the Department of Corrections ("DOC") on or about September 6, 2005. The DOC has moved to dismiss the grievance for lack of jurisdiction and failure to state a claim upon which relief can be granted. The basic factual background underlying the Motion is not in dispute.

Theresa Hitchens-Abrams ("Grievant") is a Correctional Officer employed by the DOC as a corporal in the transportation unit. On June 11, 2004 a State holiday was declared to honor Ronald Reagan. Due to staffing shortages in the three Bureau of Prisons institutions, Grievant and 29 other Court and Transportation officers normally scheduled to work on June 11th were directed to report to a prison institution to help relieve staff shortages in that facility. The night before her scheduled work day, Grievant phoned in and left a message on the answering machine that she would not be reporting to work on June 11th because she had scheduled a doctor's appointment for her son. Grievant and 17 other Court and Transportation officers scheduled to report to work on that date, failed to report to work, and Grievant was subsequently found to be insubordinate and docked 8 hours of pay.

Grievant appealed that determination of insubordination and a Step 2 hearing was conducted by Deputy Warden, Lawrence A. McGuigan, after which he determined that Grievant was not insubordinate for calling in sick on a day declared as a state holiday after being directed to report to work but finding that she should be charged with using sick leave and paid for the 8 hours of sick leave. Grievant claimed that she presented sufficient documentation for approval of sick leave to overrule the finding of insubordination and, therefore, should not have been docked or charged for sick leave. Grievant contends that she should not have been charged with sick leave usage since the day in question was a state holiday.

The DOC asserts that Grievant was a member of the employee bargaining unit known as the Correctional Officers Association of Delaware ("COAD") and the DOC contends that Grievant is bound by the terms of an interim COAD collective bargaining agreement ("CBA") in place at the time of the dispute in question. (A copy of the collective bargaining agreement is attached to the Motion as Exhibit A and is incorporated herein by reference.)

Specifically, the DOC argues that the Delaware Code and the Merit Rules at Merit Rule 1.3 and 18.3 state that when a worker is covered by a collective bargaining agreement, the worker is bound by that agreement. According to DOC, the interim COAD collective bargaining agreement provides separate grievance procedures to be used depending upon whether the matter being grieved relates to working conditions or to discipline.

In this case the DOC management asserts that there are two separate issues. The first is the disciplinary issue related to the charge of insubordination which the Grievant appealed and which was disposed of at the Step 2 hearing. The DOC contends that the second issue, whether the Grievant followed proper procedures for asking for leave in regard to the adequacy and timelines of her documentation and is entitled to sick leave on a particular day, is controlled by Article 10 of the Grievant's CBA dealing with attendance and the DOC has the sole right to make that determination.

The DOC further argues that where a grievance is related to the docking of pay for unsatisfactory sick leave documentation (i.e. working conditions), the CBA provides that the matter start at the Commissioner's level (clause 10.19) and that unless the dispute involves discipline, that it be governed by the process outlined in Article 7 (clause 10.20), which ends at Step 2. Article 8 of the CBA defines "discipline" as verbal or written warnings, reprimands, suspensions, demotion or dismissal. In addition, although at Step 2 the docking of pay was upheld (Exhibit B to the Motion), a separate Step 2 grievance decision determined that Grievant's actions did not constitute insubordination (Exhibit C to the Motion) and therefore no discipline, as defined in the CBA, was imposed. The DOC argues that the issue of whether Grievant submitted appropriate documentation for her sick leave was an argument that she had to make under the terms of the CBA at the commissioner's level and is not properly before the MERB.

The DOC also pointed out that the issue was appealed to the State Personnel Office prior to coming to the MERB, and State personnel issued a pre-arbitration letter finding that the contract was not violated. State Personnel never reached the merits of the documentation issue because it determined that the contract controlled. There was, therefore, no appeal to State personnel. The DOC submitted that if the MERB decided it had jurisdiction, the proper remedy would be a remand for a Step 3 decision which did not occur. If the matter were referred for a Step 3 pre-arbitration hearing under Article 9 of the contract, the DOC would not contest the timeliness of the Step 3 hearing but would continue to argue that the docking did not constitute discipline. It would ultimately be up to the arbitrator to decide.

In response to the Motion to Dismiss, the Grievant submits that the CBA does not cover all areas of dispute. Grievant submits that the DOC did not allow employees who were found to be insubordinate and docked pay to argue both charges even though they arose from one incident. Their only option was to file on the insubordination charge. At the Step 2 hearing, Grievant presented enough documentation to rebut the finding of insubordination, therefore; there should have been a finding that she called in properly based on DOC standards. As to the Grievant's attempted appeal to Step 3, she contends that no one from DOC showed up and State Personnel just issued a decision that there was no decision reached. There was no hearing.

Grievant argues that the failure to pay a day's work is a disciplinary action that would be subject to Articles 8 and 9 of the contract. However, the Grievant argues that the DOC separated out the insubordination and docking into separate issues. Grievant did not believe that an appeal for arbitration following the Step 2 decision was an option. Grievant maintains that once the charge of insubordination was negated the hours should have reverted back to compensation for a holiday and

no sick leave should have been charged. The Grievant stated that the issue would come under holiday pay because she was not given a holiday. Holiday pay is covered by the Merit Rules.

In response, the DOC submitted that there was no grievance filed with regard to holiday pay. If in fact the Grievant believed the docking was really disciplinary, it would have been up to the Grievant to appeal under the CBA to get that determination. However, the DOC maintains that it was not discipline but whether the Grievant should have been docked based on whether she provided appropriate and timely documentation. That is covered by the CBA.

DISCUSSION

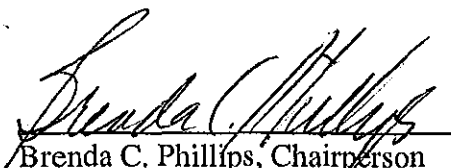
The DOC has the burden with regard to the Motion to Dismiss before the MERB. The DOC has argued that the docking of pay was not discipline. For purposes of a determination on the issue of the MERB's jurisdiction, the Board accepts that position. However, if it is not discipline it is either covered under another part of the CBA as argued by the DOC or covered by the Merit Rules as argued by the Grievant. The Board agrees with counsel for the DOC that the CBA at issue in this matter is not a model of clarity and it is difficult to interpret. Under the facts of this case, the Board is not persuaded that the grievance is related to solely to working conditions and attendance and call off procedures controlled by the CBA as argued by the DOC. The Board finds, instead, that it involves questions related to holiday or sick leave governed by 29 Del C. § 5933 and the Merit Rules corresponding thereto.

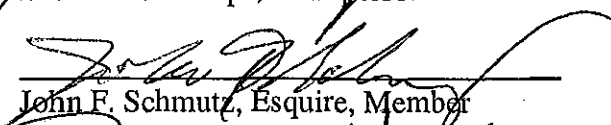
The Board, therefore, finds that the grievance is properly before the MERB.

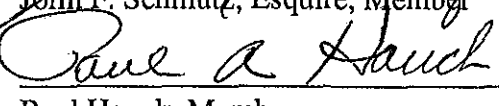
DECISION AND ORDER

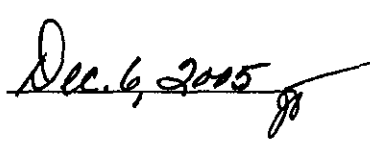
For the reasons stated, the Motion to Dismiss filed by the DOC is denied and the grievance is to be scheduled for hearing before the MERB.

IT IS SO ORDERED this 1st day of December 2005.


Brenda C. Phillips, Chairperson


John F. Schmutz, Esquire, Member


Paul Houck, Member

Mailing Date: 

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Merit Employee Relations Board